

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA,)	
)	CRIMINAL NO. 15-10271-WGY
v.)	
)	
ALEX LEVIN,)	
)	
Defendant.)	

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

The United States of America, pursuant to Fed. R. Crim. P. 30, requests that the Court, in addition to its usual instructions in criminal cases, give the following instructions to the jury. The government reserves the right to supplement or amend these instructions up to and during the trial in this case.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

Dated: May 14, 2019

By: /s/ Anne Paruti
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DUTY OF THE JURY TO FIND FACTS AND FOLLOW LAW

It is your duty to find the facts from all the evidence admitted in this case. To those facts you must apply the law as I give it to you. The determination of the law is my duty as the presiding judge in this court. It is your duty to apply the law exactly as I give it to you, whether you agree with it or not. You must not be influenced by any personal likes or dislikes, prejudices or sympathy. That means that you must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions, or into anything I may have said or done, any suggestions by me as to what verdict you should return – that is a matter entirely for you to decide.

Torresen, C.J., 2019 Revisions to Pattern Jury Instructions for the District Courts of the First Circuit, No. 3.01 (updated 2/1/19) (hereinafter “Torresen 2019 Pattern Instructions”) (available at <https://www.med.uscourts.gov/pdf/crpjilinks.pdf>).

PRESUMPTION OF INNOCENCE; PROOF BEYOND A REASONABLE DOUBT

It is a cardinal principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until his guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the most important substance.

The presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant. The defendant before you has the benefit of that presumption throughout the trial, and you are not to convict him of any crime charged unless you are persuaded of his guilt of that charge beyond a reasonable doubt.

The presumption of innocence until proven guilty means that the burden of proof is always on the government to satisfy you that the defendant is guilty of the crimes with which he is charged beyond a reasonable doubt. It is a heavy burden, but the law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant. It is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence. The defendant has the right to rely upon the failure or inability of the government to establish beyond a reasonable doubt any essential element of the crimes charged against him.

If, after fair and impartial consideration of all the evidence, you have a reasonable doubt as to the defendant's guilt of a particular crime, it is your duty to find him not guilty of that crime. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of the defendant's guilt of a particular crime, you should find him guilty of that crime.

DEFENDANT'S CONSTITUTIONAL RIGHT NOT TO TESTIFY

The defendant has a constitutional right not to testify and no inference of guilt, or of anything else, may be drawn from the fact that he did not testify. For any of you to draw such an inference would be wrong; indeed, it would be a violation of your oath as a juror.

WHAT IS EVIDENCE; INFERENCES

The evidence from which you are to decide what the facts are consists of sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; the exhibits that have been received into evidence; and any facts to which the lawyers have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you chose.

Although you may consider only the evidence presented in the case, you are not limited in considering that evidence to the bald statements made by the witnesses or contained in the documents. In other words, you are not limited solely to what you see and hear as the witnesses testified. You are permitted to draw from facts that you find to have been proven such reasonable inferences as you believe are justified in the light of common sense and personal experience.

KINDS OF EVIDENCE: DIRECT AND CIRCUMSTANTIAL

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness that the witness saw something. Circumstantial evidence is indirect evidence, that is proof of a fact or facts from which you could draw the inference, by reason and common sense, that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

CREDIBILITY OF WITNESSES

Whether the government has sustained its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented. You do not have to accept the testimony of any witness if you find the witness not credible. You must decide which witnesses to believe and which facts are true. To do this, you must look at all the evidence, drawing upon your common sense and personal experience.

You may want to take into consideration such factors as the witnesses' conduct and demeanor while testifying; their apparent fairness or any bias they may have displayed; any interest you may discern that they may have in the outcome of the case; any prejudice they may have shown; their opportunities for seeing and knowing the things about which they have testified; the reasonableness or unreasonableness of the events that they have related to you in their testimony; and any other facts or circumstances disclosed by the evidence that tend to corroborate or contradict their versions of the events.

WEIGHING THE TESTIMONY OF AN EXPERT WITNESS

You have heard testimony from persons described as experts. An expert witness has special knowledge or experience that allows the witness to give an opinion.

You may accept or reject such testimony. In weighing the testimony, you should consider the factors that generally bear upon the credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

Remember that you alone decide how much of a witness's testimony to believe, and how much weight it should be given.

**CAUTIONARY AND LIMITING INSTRUCTIONS
AS TO PARTICULAR KINDS OF EVIDENCE**

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. Throughout the trial, I have told you when that occurred, and instructed you on the purposes for which the item can and cannot be used.

Torresen 2019 Pattern Instructions No. 3.07.

WHAT IS NOT EVIDENCE

Certain things are not evidence. I will list them for you:

1. Arguments and statements by lawyers are not evidence because the lawyers are not witnesses. What they said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them from the evidence differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.
3. Anything that I have excluded from evidence or ordered stricken and instructed you to disregard is not evidence. You must not consider such items.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.
5. The Indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that this defendant has been indicted is no evidence whatsoever of his guilt. The indictment is simply an accusation. It is the means by which the allegations and charges of the government are brought before this court. The indictment proves nothing.

Torresen 2019 Pattern Instructions No. 3.08.

ELEMENTS OF THE OFFENSE - INTRODUCTION

I am now going to give you some instructions on the nature of the crime charged in the Indictment and the elements of the offense that the government must prove beyond a reasonable doubt.

The Indictment contains one count, charging the defendant with possession of child pornography, a crime allegedly committed on or about August 12, 2015.

I will now explain the elements of this charge.

POSSESSION OF CHILD PORNOGRAPHY

The sole count of the Indictment charges the defendant with the crime of possession of child pornography.

The defendant is accused of knowingly possessing any material that contained one or more images of child pornography, that involved a prepubescent minor or a minor who had not attained 12 years of age, and that had been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or that was produced using materials that had been mailed, or shipped and transported in or affecting interstate or foreign commerce by any means, including by computer.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following things beyond a reasonable doubt:

- (1) First, that the defendant knowingly possessed a computer;
- (2) Second, that the computer contained at least one image of child pornography;
- (3) Third, that the defendant knew that the computer contained an image of child pornography;
- (4) Fourth, that the image of child pornography had moved in interstate or foreign commerce; and
- (5) Fifth, that at least one of the images involved a prepubescent minor or a minor under the age of 12 years old.

I will now define several terms contained within these elements.

“KNOWINGLY”

To act “knowingly” means to act voluntarily and intentionally and not because of mistake or accident.

Torresen 2019 Pattern Instructions No. 4.18.2252.

POSSESSION

“Possess” means to exercise authority, dominion, or control over something. The law recognizes different kinds of possession. “Possession” includes both actual and constructive possession. A person who has direct physical control of something on or around his person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term “possession” in these instructions, I mean actual as well as constructive possession.

CHILD PORNOGRAPHY

Child pornography is any photograph, video, picture, or computer image of sexually explicit conduct that was produced by using an actual person under the age of 18 engaging in sexually explicit conduct.

Sexually explicit conduct includes any one of the following categories of conduct, whether actual or simulated: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; (2) masturbation; (3) sadistic or masochistic abuse; or (4) lascivious exhibition of the genital or pubic area of any person.

Whether an image of the genitals or pubic area constitutes a “lascivious exhibition” requires a consideration of the overall content of the material. In considering the overall content of the image, you may, but are not required to, consider the following factors: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image appears intended or designed to elicit a sexual response in the viewer. An image need not involve all of these factors to constitute a lascivious exhibition.

It is for you to decide the weight, or lack of weight, to be given to any of the factors I just listed. You may conclude that they are not applicable given the facts of this case. This list of factors is not comprehensive and you may consider other factors specific to this case that you find relevant.

Adapted from Torresen 2019 Pattern Instructions No. 4.18.2252.

“MOVED IN INTERSTATE OR FOREIGN COMMERCE”

An image has been “shipped or transported in interstate or foreign commerce” if it has been transmitted over the Internet or over telephone lines. The jurisdictional element may also be satisfied by showing that the receptacle for the possessed child pornography was manufactured outside of Massachusetts. The government need not prove that the defendant had actual knowledge of the jurisdictional element.

Torresen 2019 Pattern Instructions No. 4.18.2252. *United States v. Burdulis*, 753 F.3d 255, 261-262 (1st Cir. 2014)(joining Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits in so holding). *United States v. Hilton*, 257 F.3d 50, 54 (1st Cir. 2001), citing *United States v. Robinson*, 137 F.3d 652, 654-55 (1st Cir. 1998).

PUNISHMENT

The question of possible punishment of the defendant is of no concern to the jury and should not, in any sense, enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the court. Your function is to weigh the evidence in the case and to determine whether or not the defendant is guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment which may be imposed upon the defendant, if he is convicted, to influence your verdict, in any way, or, in any sense, enter into your deliberations.

L. B. Sand, *Modern Federal Jury Instructions: Criminal*, § 9-1 (1990).

FOREPERSON'S ROLE; UNANIMITY

I come now to the last part of the instructions, the rules for your deliberations. When you retire you will discuss the case with the other jurors to reach agreement if you can do so. You shall permit your foreperson to preside over your deliberations, and your foreperson will speak for you here in court. Your verdict must be unanimous.

CONSIDERATION OF EVIDENCE

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be – that is entirely for you to decide.

REACHING AGREEMENT

Each of you must decide the case for yourself, but you should do so only after considering all the evidence, discussing it fully with the other jurors, and listening to the views of the other jurors.

Do not be afraid to change your opinion if you think you are wrong. But do not come to a decision simply because other jurors think it is right.

This case has taken time and effort to prepare and try. There is no reason to think it could be better tried or that another jury is better qualified to decide it. It is important therefore that you reach a verdict if you can do so conscientiously. If it looks at some point as if you may have difficulty in reaching a unanimous verdict, and if the greater number of you are agreed on a verdict, the jurors in both the majority and the minority should reexamine their positions to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the jurors who disagree with them. You should not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate.

It is important that you attempt to return a verdict, but of course, only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

RETURN OF VERDICT FORM

I want to read to you what is called the verdict form. This is simply the written notice of the decision you will reach in this case.

[Read verdict form.]

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the jury officer outside your door that you are ready to return to the courtroom.

After you return to the courtroom, your foreperson will deliver the completed verdict form as directed in open court.

COMMUNICATION WITH THE COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the jury officer signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me on anything concerning the case except by a signed writing, and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. If you send out a question, I will consult with the parties as promptly as possible before answering it, which may take some time. You may continue with your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone – including me – how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Torresen 2019 Pattern Instructions No. 6.05.

CERTIFICATE OF SERVICE

I, Anne Paruti, hereby certify that the foregoing was filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

Date: May 14, 2019

/s/ Anne Paruti
Assistant United States Attorney